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November 1, 2007

BY E-MAIL AND FEDERAL EXPRESS

Eric Gillies, Project Manager
CALIFORNIA STATE LANDS COMMISSION
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825

Re: Comments on Behalf of Venoco, Inc.
PRC 421 Recommissioning Project
Draft EIR (CSLC EIR No. 732)

Dear Mr. Gillies:

These comments are submitted on behalf of our client, Venoco, Inc. These comments focus principally upon issues related to the DEIR's project description, baseline and project alternatives, including the "no-project alternative." Additional comments on other aspects of the DEIR are being submitted on behalf of Venoco under separate cover.

Summary

The EIR should include a description of the regulatory context of this matter and Venoco's position on the company's right to resume Lease 421 operations. The EIR should also include an environmental analysis of impacts measured against a baseline that reflects historical operations. Moreover, any baseline that reflects the current environmental setting should include a discussion of impacts associated with repressurization of the reservoir. The EIR should also include as part of its analysis of the no project alternative the resumption of operations, since Venoco has the right to resume operations unless the State of California compensates Venoco for its project interests. The feasibility of the use of the EOF depends on the City of Goleta's concurrence, and other corrections to the text of the DEIR need to be made as well.

Discussion

A. The Project Description and Project Objective Should Include a Discussion of the Regulatory Context of this Matter.

The DEIR correctly describes the proposed project and project objective as "seeking approval from the California State Lands Commission (CSLC) to return PRC 421 to oil production." ES-1. However, the DEIR should also explain the regulatory context in which CSLC's decision is to be made. The question properly before CSLC is whether "adequate corrective measures" have been or will be taken, such that Lease 421 operations can resume.

The DEIR (pp. 2-3 thru 2-4) accurately summarizes PRC 421 spill and repair history. The EIR should also explain that PRC 421 production operations were suspended in accordance with CSLC's regulations, namely 2 Cal. Code Regs. §§ 2121 and 2137. These similarly-worded provisions require lessees to suspend production operations in the event of any contamination or pollution resulting from leasehold operations. The regulations also provide that production operations are not to be resumed until "adequate correction measures have been taken and authorization of resumption of operations has been made...."

The purpose of these regulations is to ensure that the cause of an incident that precipitated the suspension of operations has been properly addressed so that operations can resume safely.[1] Thus, in reviewing this matter CSLC is not exercising its conventional discretionary decision making authority as when deciding whether to issue a lease in the first instance. Instead, the Commission will be called upon to decide whether "adequate corrective measures" have been or will be taken so that leasehold operations can resume.

Mobil and Venoco completed all of the corrective measures required to date. Venoco stands ready, willing and able to complete all remaining corrective measures necessary to resume operations. Upon completion of the remaining measures, Venoco is entitled to resume Lease 421 operations, at least under the original operating mode with the appropriate safety and environmental enhancements. The EIR should explain this, since it bears upon the baseline and no project alternative analyses.

[1] A suspension of operations under 2 CCR §§ 2121 or 2137 is by definition temporary. See, for example, Webster's New World Compact Office Dictionary, 4th Ed. (2003), which defines "suspension" as "to stop temporarily."

B. Venoco Has Vested Rights to Resume Operations.

A more thorough discussion of Venoco's contractual and constitutionally protected vested rights in PRC 421 operations appears in our November 2, 2005 letter to you, a copy of which is attached hereto and incorporated by this reference.

In brief, Venoco has a valid and subsisting lease. This lease authorizes Venoco to conduct Lease 421 operations for so long as production operations are in "paying quantities." As used in the "habendum" or term clause of an oil and gas lease such as this, the term "production in paying quantities" means that the proceeds of production exceed operating costs. *Renner v. Huntington-Hawthorne Oil & Gas Co.* (1952) 39 Cal 2d 93, 98-99. There can be no dispute about the fact that Lease 421 is capable of producing in paying quantities.

It is well established in California that an oil and gas lease such as PRC 421 creates in the lessee a determinable fee interest upon a special limitation. *Dabney v. Edwards* (1935) 5 Cal 2d 1, 11-13. Thus, the lessee's leasehold interest is an interest in land, i.e. it is real property. See e.g. *Calahan v. Martin* (1935) 3 Cal 2d 110; *Dabney v. Edwards, supra* at 53. "The lease gives the lessee the exclusive right to take the oil and gas." 4 Witkin, *Summary of California Law*, 9th Ed. Real Property § 737.

Venoco's working interest in Lease 421 constitutes a fundamental vested right. See, e.g. *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal App 4th 1519, 1529 ("Interference with the right to continue an established business is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance. Certainly, this right is sufficiently personal, vested and important to preclude its extinction by a non-judicial body.")

Once adequate corrective measures have been taken, CSLC could not lawfully deprive Venoco of the right to resume operations without fully compensating Venoco for damages for breach of the lease, or by providing just compensation for such a taking. See, e.g. *Amber Resources Co. v. United States,* 68 Fed. Cl. 535 (2005) *"Amber I"*; and *Amber Resources Co. v. United States,* 73 Fed. Cl. 738, 748 (2006) *"Amber II"* (lessees deprived of oil and gas lease benefits by the government allowed to proceed judicially by seeking rescission or reliance damages); and *Brown v. Legal Found.* (2003) 538 U.S. 216. 235-236 (just compensation required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain).

It is important for the EIR to briefly describe Venoco's position on vested rights, since this matter also influences the proper baseline and no project alternative analyses. The EIR's proper treatment of these subjects is discussed next.

C. The Baseline Analysis Should Be Modified.

The baseline description and associated analyses should be modified. Section 1.2.3 of the DEIR defines the baseline in terms of the current environmental setting, i.e. as "existing project infrastructure, no current production from PRC 421...." p. 1.5: 7-8. Since Venoco has the right to resume operations, an environmental analysis based upon a baseline reflecting historical operations should be included as well.

The general rule is that the existing environmental setting should normally constitute the baseline against which agencies assess the significance of project impacts. CEQA Guidelines § 15125(a). However, in exceptional circumstances a "past" or "future" baseline may be appropriate. For example, where an applicant proposes a project which modifies an existing project, the baseline should consider any normal historical fluctuations in the existing project operations. *Amador County v. El Dorado County Water Agency* (1999) 76 Cal App. 4th 931. See also, *Fairview Neighbors v. County of Ventura* (1999) 70 Cal App. 4th 238, where the court held that historical mining operations were an appropriate baseline, despite the fact that the original CUP had expired. It was understood that the applicant would be permitted to continue operations. The court concluded that using more recent traffic counts would be misleading because traffic generated by the mine had fluctuated considerably based on need, capacity and other factors. Similarly, if as Venoco contends, leasehold operations will resume in one configuration or another, the EIR's baseline description and accompanying analysis should also reflect historic operations. The environmental analysis utilizing this baseline can be done separately, i.e. in parallel with that utilizing a baseline that reflects the current environmental setting. In this way, the FEIR need not attempt to resolve the merits of Venoco's vested rights position.

Finally, the environmental analysis using the baseline that reflects the current environmental setting should be broadened to include a discussion of all significant impacts associated with repressurization of the reservoir. These impacts fall into issue areas including geologic resources, safety, hazardous materials, water quality, biological resources, aesthetics, and energy and mineral resources. The DEIR discusses the repressurization phenomenon at pages 2-4 thru 2-6, but not in the proper context of these environmental effects being part of the current environmental setting.

D. The No Project Alternative Analysis Should be Modified.

CEQA Guidelines § 15126.6(e)(2) requires that the analysis of the "no project alternative" must:

> "[D]iscuss the existing conditions at the time the notice of preparation is published, or if no notice of preparation is published, at the time the environmental analysis is completed, as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services." Emphasis added.

Thus, CEQA recognizes that the denial of a proposed project does not always guarantee the preservation of existing environmental conditions. This is the case here where, unless just compensation is paid to Venoco for its PRC 421 interests, failure to approve the project would mean that leasehold operations will continue, at least utilizing much of the historic production methods. This is an alternative discussed in Section 3.3.4. However, at a minimum, the no project alternative discussion should inform the reader that if Venoco has vested rights to resume operations, the no project alternative would be the resumption of historic operations.

E. The Feasibility of Use of EOF Depends Upon the City of Goleta's Concurrence.

Venoco believes that the EOF can legally and should accommodate Lease 421 production. However, the EIR should clarify that unless the City of Goleta determines that Lease 421 production can be handled at the EOF consistent with the onshore facility's legal non-conforming use status and the City's General Plan, this would not be a feasible alternative.

EIR's must describe a reasonable range of alternatives to the project or its location that could feasibly attain most of the basic objectives of the project. CEQA Guidelines § 15126.6(a) & (f). Factors to be taken into account when addressing the feasibility of alternatives include general plan consistency, jurisdictional boundaries and whether the proponent can reasonably gain access to the alternate site. *Citizens of Goleta v. Board of Supervisors* (1990) 52 Cal. 3d 553; CEQA Guidelines § 15126.6(f)(1). Goleta's General Plan states that the City's "intent is that oil production not be recommended at S.L. 421," and that on-pier processing within the tidal zone should not be approved unless there is no feasible less damaging alternative. Section LU 10.4 (a) and (b). The EOF is a legal non-conforming use. Venoco believes that the EOF can legally accommodate Lease 421 production. However, unless the City of Goleta acknowledges that this can occur without a General Plan amendment and rezone, this would not be a feasible alternative. The EIR should explain this.

F. Other Matters

i) **Section 4.8.5, p. 4-304: 17-20.** Lease 421 is a legal conforming use, not a legal non-conforming use. See e.g. Santa Barbara County Staff Report 01DVP-0-00040, Sec. 6.1.1.7.

ii) **Section 4.8.** The Land Use Planning and Recreation analysis needs to be made jurisdictionally specific with reference to project components. For example, the City of Goleta GP/CLUP analysis and policy summary Table 4.8-2 blur the distinction between portions of the project that are located within and outside of the City's jurisdiction. The consistency analysis needs to be modified accordingly for each jurisdictional entity.

iii) **Section 4.2 (MMS-II), pp. 4-90 & 4-91.** Venoco believes that it has a vested right to produce Lease 421. If the project is not approved, Venoco intends to pursue the matter, however long it may take. Expedited abandonment is not a legally feasible mitigation measure.

Thank you for this opportunity to comment.

Very Truly Yours,

HOLLISTER & BRACE

By _____
Steven Evans Kirby

SEK:bew

Attachment

Copy: Venoco, Inc.

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November 2, 2005

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Re: Vested Rights and "No Project Alternative"
Venoco's Resumption of Lease PRC 421 Operations

Dear Mr. Gillies:

This office represents Venoco, Inc. in connection with the resumption of Lease PRC 421 operations. In his July 5, 2005 letter to you, Tom Luster of the California Coastal Commission asked whether Venoco has any vested rights in oil and gas production activities on the leasehold. Venoco has asked us to give our opinion on this question and on an ancillary issue, i.e. the appropriate description of the "no project alternative" in the environmental document being prepared for this project. We address both of these matters below.

I.

VENOCO'S RIGHTS IN LEASE PRC 421 OPERATIONS

A. Facts.

We understand the essential facts to be as follows:

The subject lease (originally referred to as State Lease No. 89) was granted to a predecessor-in-interest of Venoco in 1929. The lease was reissued in 1949, and later amended in 1959. The leased lands consist of certain State public trust tide and submerged lands in the Ellwood Field administered by the State Lands Commission (CSLC). The leased lands were formerly within the territory of the County of Santa Barbara, but have been within the City of Goleta since the City's incorporation in 2002.

Existing production facilities include two piers located on the leasehold premises about one-half mile south of the Ellwood Onshore Facility (EOF) on APN 079-210-059. These two piers provide structural support for two idle wells located on separate concrete caissons. The wells are designated Well Nos. 421-1 and 421-2. Well 421-2 is currently an idle fluid production well historically produced by means of a beam pump artificial lift system. Well 421-1 is an idle fluid injection well used for disposal of the produced water from Well 421-2. The well 421-1 pier contained production separation equipment, including a 1,000 bbl crude oil tank, a 60 bbl free water knock-out vessel, a 20 bbl test tank, an oil shipping pump, water injection pump, natural gas fired internal combustion shipping pump engine, together with miscellaneous instrumentation and piping. The production site is accessed by means of a road from the EOF.

PRC 421 produced oil and gas continuously for more than 60 years from 1930 through 1993, and intermittently during 2000 and 2001. Operations were conducted by various companies, including Signal, Arco, Mobil and Venoco. During Mobil's operatorship in 1994, a leak was discovered in the transfer line connecting PRC 421 to Line 96. Mobil shut-in the wells and made the necessary repairs. In October 1994, Santa Barbara County confirmed Mobil's right to resume shipping through the transfer line subject to Mobil's submission of a "Recommissioning Plan" (SBC 94-FDP-009, Condition 4).

In May 1997, Venoco acquired all of Mobil's right, title and interest in the leasehold and facilities. CSLC approved the assignment of the lease to Venoco in July 1997. Since acquiring the lease, Venoco has been attempting to resume operations. Venoco submitted recommissioning plans in 1997, 1998 and 2001. None of these applications was approved due to Santa Barbara County's refusal to allow PRC 421 production to be processed at the EOF as proposed in each of the applications.

In November 2000, gas and oil were discovered leaking from the wells. Venoco obtained an emergency permit from the County (00-EMP-006) authorizing the appropriate remedial work. Venoco successfully completed a three-phase corrective action program in 2001 in accordance with the terms of the County's emergency permit. This consisted of road repairs, pier fortification and well stabilization. This work was completed at a cost to Venoco of approximately $3.8 million. In May 1997, the Santa Barbara County APCD granted Venoco Permit to Operate No. 8103 for PRC 421 operations. The permit was renewed in November 2002 and remains current.

Without conceding that the EOF cannot legally accommodate PRC 421 production, Venoco submitted a revised recommissioning plan in May 2004.[1] Under the revised plan, Well 421-2 will be returned to service as a production well equipped with a new downhole electric submersible pump (ESP). Well 421-1 will be returned to service as a produced water injection well. All separation and handling of produced substances will take place on the Well 421-2 pier utilizing state-of-the-art cyclonic technology. The existing pipelines for oil, produced water and gas will be repaired or replaced, and new direct power and communications cables will be installed, together with process monitoring and control facilities. A minor amount of trenching will occur along Venoco's upland easements through Sandpiper Golf Course. As in the past, leasehold production will be transported through the transfer line to Line 96. PRC 421 production will not go to the EOF. The only activity at the EOF will be installation of an electrical service connection to power PRC 421 operations. This connection is proposed to be made within the boundary of the EOF for equipment protection reasons. If this location is unavailable, the connection can be made elsewhere.

The remaining productive life of Lease PRC 421 is estimated to be about 12 years. Oil production is projected to be at an average rate of about 700 bpd. CSLC, as lead agency, has issued a Notice of Preparation of the Draft EIR for the recommissioning project (SCH. No. 2005061013).

B. **Venoco's Rights.**

In our opinion, Venoco has both the contractual right and a constitutionally protected vested right to resume PRC 421 operations.

i) **Contractual Right: The Lease**

Venoco's lease for PRC 421 is valid and subsisting. CSLC expressly approved Mobil's assignment of the lease to Venoco on July 11, 1997. Venoco's efforts

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[1] Venoco's recommissioning application to CSLC will apparently be processed pursuant to 2 Cal. Admin. Code § 2137, which provides as follows:

> "A lessee shall suspend immediately any drilling and production operations, except those which are corrective, protective, or mitigative, in the event of any disaster of or contamination or pollution caused in any manner or resulting from drilling and/or production operations under its lease. Such drilling and/or production operations shall not be resumed until adequate corrective measures have been taken and authorization for resumption of such operations has been made by the Staff. Corrective measures shall be taken immediately whenever pollution has occurred."

to resume operations have been ongoing since then, and CSLC has never sought to cancel the lease. Pub. Res. Code § 6805.

Paragraph 1 of the lease grants to the lessee the exclusive right to drill for and produce substances from the leasehold. Paragraph 21 encourages "the maximum recovery of oil and gas". See also, 2 Cal. Admin. Code § 2119 (lease production operations shall be at maximum efficient rate); and Pub. Res. Code § 6830.1(a), in which the California Legislature declared the following:

> "That the people of the State of California have a direct and primary interest in assuring the production of the optimum quantities of oil and gas from lands owned by the state, and that a minimum of oil and gas be left wasted and unrecovered in such lands." Emphasis added.

Thus, upon the implementation of adequate corrective measures to ensure safe operations (2 Cal. Admin. Code § 2137), Venoco has a contractual right to resume leasehold operations in accordance with the terms of the lease and applicable CSLC regulations. The resumption of operations is also consistent with State policy to achieve maximum recovery of hydrocarbons from the leased lands.

ii) **Vested Right.**

Venoco also has a constitutionally protected vested right in these operations. In *Avco Community Developers, Inc. v. South Coast Regional Com. (Avco)* (1976) 17 Cal.3d 785, 791, the California Supreme Court set forth California's vested right doctrine applicable in the land use setting:

> "It has long been the rule in this State and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. [Citation.] Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied."

The vested right to complete construction includes the right to use or operate the project once it is completed. *McCaslin v. City of Monterey Park* (1958) 163 Cal.App.2d 339, 347 ("Plaintiff had a vested property right in the use of his project as a

quarry of decomposed granite of which he could not be constitutionally deprived without due process of law.") See also, *Hansen Bros. Enterprises v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533, 552 ("The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected [Citation omitted]"). As more fully explained below, when land use regulations, such as zoning restrictions or permit requirements, change after the vested right is established, the vested use is commonly described as a "grandfathered" or "legal non-conforming" use. Subsequently enacted regulations that would otherwise preclude or require a discretionary special use permit to operate are generally inapplicable. Thus, where the use is lawfully established prior to the adoption of permit requirements, a special use permit is not necessary to continue the use. Its grandfathered status is regarded as the legal equivalent of a "deemed approved" conditional use permit. *Korean Am. Legal Advocacy Fund v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 391-392, fn. 5.

Lease 421 operations constitute such a vested use. PRC 421 drilling and production operations began lawfully in 1929, long before the adoption of zoning ordinances by Santa Barbara County and the City of Goleta, and long before enactment of the California Coastal Act. Thus, prior operators of PRC 421 established the vested right in leasehold operations. This vested right passed to Venoco with its acquisition of the leasehold in 1997. As the California Supreme Court explained in *Hansen Bros. Enterprises v. Board of Supervisors of Nevada County, supra,* 12 Cal.4th at 540, fn. 1, "[t]he use of the land, not its ownership, at the time the use becomes non-conforming determines the right to continue the use. Transfer of title does not affect the right to continue a lawful non-conforming use which runs with the land."

Santa Barbara County in 1991 rezoned the parcel on which the EOF is located to REC ("Recreation"). Thus, from the standpoint of zoning, the EOF is today considered a legal non-conforming use, while operations on the leasehold itself remain a legal conforming use (SBC Staff Report 01DVP-0-00040, Section 6.1.1.7). The transmission line running from the piers to Line 96 is also considered a legal conforming use, since oil and gas pipelines are an expressly permitted use in the REC zone district (CZO § 35-157.2).

From the standpoint of special use permit requirements, such as those in the Coastal Zoning Ordinance which were adopted after the vested right in PRC 421 operations was established, Venoco's operations are properly characterized as grandfathered. As stated above, this vested right in Lease PRC 421 operations means that, as a matter of law, no such discretionary special use permit to operate can be required. See, e.g., *City of Oakland v. Superior Court* (1986) 45 Cal.App.4th 740, 747,

fn. 1 ("Grandfathered businesses are non-conforming uses that are not required to seek permits under local zoning ordinances ...."); *O'Mara v. City of Newark* (1965) 238 Cal.App.2d 836, 841 ("Furthermore, as stated in *McCaslin v. City of Monterey Park*, 163 Cal.App.2d 339, 348-349 [cites omitted] 'Having established the nonconforming use, [the owner] was entitled to continue his operations as a matter of right. He was not required to obtain a special use permit.'"); and *Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1285, fn.

a) The vested right has not been abandoned.

Venoco's vested right to operate PRC 421 has not been abandoned despite years of non-production. In California, the mere cessation of operations does not constitute an abandonment of the vested use. Instead, in order to forfeit the vested right the holder must intend to abandon it. As the Supreme Court in *Hansen Bros. Enterprises, supra,* 12 Cal.4th at 569 held:

> "Cessation alone does not constitute abandonment. '[A]bandonment of a non-conforming use ordinarily depends upon the concurrence of two factors: (1) an intention to abandon; and (2) an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the non-conforming use [citations omitted]."

Venoco has never manifested an intent to abandon its right to operate Lease PRC 421. To the contrary, Venoco has spent millions of dollars rehabilitating PRC 421 facilities, and Venoco's administrative efforts to resume operations have persisted since acquiring the leasehold in 1997. Thus, the vested right in PRC 421 operations remains intact today. See also, *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 792 ("Respondent has not referred us to any law, and we have found none, which says that a vested right is divested because the owner of the right is prevented from exercising it by circumstances over which he has no control.").

b) Scope of the vested right.

We also conclude that the scope of Venoco's vested right accommodates repair and replacement activities necessary for Venoco to resume operations safely and efficiently. Because of the doubtful constitutionality of a municipality's ability to immediately terminate a pre-existing lawful use, courts have used their inherent powers to protect the vested rights of property owners in these situations. *See, e.g., McCaslin v. City of Monterey Park, supra;* and *La Mesa v. Tweed & Gambrell Mill* (1956) 146

Cal.App.2d 762, 768 (to prevent a taking of property without just compensation).

The vested right to continue an existing grandfathered use also includes the right to construct certain additional facilities integral to the operation where the nature and scope of the operation contemplate it. *Halaco Engineering Co. v. South Central Coast Regional Commission* (1986) 42 Cal.3d 52, 74-77. Thus, if a municipality were to refuse to apply its own permit exemptions or refuse to issue ministerial permits for modifications to be made so that operations could continue, the municipality would unlawfully impair the vested right to operate; *i.e.*, the municipality would take the property without due process of law.

It is our opinion that the City of Goleta could not lawfully deny Venoco's right to resume operations. This conclusion necessarily follows from the nature of Venoco's vested right to operate, and from the preemptive nature of CSLC's exclusive jurisdiction over the tide and submerged lands comprising Lease PRC 421.

Lease PRC 421 and its onshore project components are located in the City of Goleta. These facilities, and the right to operate them, were established long before the City was incorporated on February 1, 2002. The City has adopted wholesale the County's Coastal Zoning Ordinance, including the County's non-conforming use regulations in CZO § 35-160 (City of Goleta Ord. Nos. 02-01 & 17).

As explained above, while local ordinances governing uses of the character involved here now require the operator to obtain discretionary special use permits, it is well established that no such special use permit can be required for one to continue operating a project with a vested right to operate, such as Venoco's upland operations associated with PRC 421. In other words, it is Venoco's vested right in the pre-existing legal use - - a right that includes the right to operate without the need for a special use permit - - that supplants the need for a discretionary use permit that might otherwise be required for a new development of a similar character. See, e.g., *Korean Am. Legal Advocacy Fund v. City of Los Angeles, supra,* 23 Cal.App.4th at 391-392, fn. 5; *Bauer v. City of San Diego, supra,* 75 Cal.App.4th at 1293; and *McCann v. Jordan* (1933) 218 Cal. 577, 580 ("It is well settled that the new ordinance may operate retroactively to require a denial of the application . . . , <u>provided</u> that the applicant has not already engaged in substantial building <u>or</u> incurred expenses in connection therewith" [citation omitted; emphasis added]).

Condition 47 of the Final Development Plan issued by Santa Barbara County in 2001 for the well stabilization work provides that "resuming well production will require separate permits from P&D as necessary and appropriate environmental

review." Any such permit(s) would necessarily be ministerial entitlements. The same is true with respect to the recommissioning plan for the resumption of pipeline operations as required by Mobil's 1994 Final Development Plan. None of the FDP conditions purports to require a discretionary special use permit and we find no evidence that either Mobil or Venoco ever agreed that the County (hence, the City) would have the discretion to deny the right to resume PRC 421 operations. We conclude that no discretionary special use permit can be required in connection with the resumption of operations.

It is also clear to us that the City of Goleta could not lawfully frustrate the resumption of leasehold operations by denying any building or other land use entitlements needed for the relatively minor onshore work necessary to safely and efficiently resume PRC 421 operations. This includes repair or replacement of the transmission line and installation of an electrical service connection. CSLC has exclusive jurisdiction over the leased tide and submerged lands. The City of Goleta has no proprietary interest therein, and the City cannot lawfully prevent operations from being conducted thereon by Venoco who holds the lease under authority of the State of California. See e.g., *City of San Pedro v. Southern Pacific Co.* (1894) 101 Cal. 333; and *Monterey Oil Company v. The City Court of the City of Seal Beach* (1953) 120 Cal.App.2d 31, 38-40, citing *Pacific Asso. v. Huntington* Beach (1925) 196 Cal. 211 ("Conversely, a direct conflict will arise if the local ordinance attempts to prohibit what the state law permits."). As the California Attorney General has explained: "As to the ungranted tide and submerged lands, jurisdiction and control is vested in the State Lands Commission . . . and the Coastal Act makes no change in that authority . . . . Local Zoning & Planning Ordinances would, as a general proposition be pre-empted by the state as to such lands." 63 Op. AG Cal.107.

By similar reasoning, the City's police power could not lawfully be employed indirectly to frustrate the State's jurisdiction and control over these public trust lands in a situation such as this involving vested operating rights, at least in the absence of proof that the upland operations would constitute an unmitigable nuisance or unmitigable danger to public health and safety. *Bauer v. City of San Diego, supra,* 74 Cal.App.4th at 1294-1295; and *Trans-Oceanic Oil Corp. v. Santa Barbara, supra,* 85 Cal.App.2d at 789 ("The owner of a property right to drill for and extract oil in a proven field acquired under a permit, may not constitutionally be deprived thereof without payment of just compensation except upon a showing that its exercise constitutes a nuisance."). It would be unreasonable to contend that the resumption of PRC 421 operations would constitute an unmitigable nuisance or danger to public health and safety.

The City's Coastal Zoning Ordinance includes a large number of permit exemptions, including the following:

- Section 35-169.2.1.a: "Repair and maintenance activities that do not result in addition to, or enlargement or expansion of, the object of such repair or maintenance activities (see Sec. 35-169.10.)"

- "d. Installation, testing, placement in service, or the replacement of any necessary utility connection between an existing service facility and any development that has been granted a Coastal Development Permit." This naturally applies to a development, that does not legally need a Coastal Development Permit to operate, i.e. such as here where the vested right is the legal equivalent of a "deemed approved" permit.

- "g. Grading, excavation, or fill which does not require a Grading Permit pursuant to Chapter 14 of the Santa Barbara County Code." This includes utility trenching and the like.

- Coastal Zoning Ordinance § 35-169.10 adopts by reference the "County Guidelines on Repair and Maintenance, Utility Connections to Permitted Development." These permit exemptions include the following activities set forth in Appendix C II:

> "D. **INDUSTRIAL FACILTIES.** No permit is required for routine repair, maintenance and minor alterations to existing facilities, necessary for ongoing production that do not expand the area or operation of the existing plant. No permit is required for minor modifications of existing structures required by governmental safety and environmental regulations, or necessary to maintain existing production capacity, where located within existing structures, and where height or bulk of existing structures will not be altered.
>
> "E. **OTHER STRUCTURES.** For routine repair and maintenance of existing structures or facilities not specifically enumerated above, no permit is required provided that the level or type of use or size of the structure is not altered."

Thus, many if not all of the changes desirable for the safe and efficient operation of PRC 421 can be made without the need for any permit at all. In the event any ministerial permits are required, the City's urgency Ordinance No. 02-24 provides the procedure for such permits to be issued, despite the fact that the City does not yet have a Local Coastal Program approved by the California Coastal Commission. Ordinance No. 02-24.

It is therefore our opinion that Venoco has a valid and subsisting lease in PRC 421, and that Venoco has the right to resume production operations.

II.

THE "NO PROJECT ALTERNATIVE" SHOULD DESCRIBE THE RESUMPTION OF LEASEHOLD OPERATIONS IN THE TRADITIONAL MODE

In its pending application to CSLC to resume operations, Venoco proposes certain new work described above. This includes installation of a new ESP in Well 421-2, installation of oil, gas and water separation equipment on the piers, repair of existing subsurface pipelines for produced substances, installation of buried power and communications cables, and provision for process monitoring and controls.

In addition to a description of environmental impacts of the proposed project, CEQA requires a description of a range of reasonable alternatives to the proposed project, including the "no project alternative." CEQA Guidelines § 15126.6. An adequate "no project alternative" discussion in the environmental document needs to do two things: a) discuss the existing conditions at the time the NOP is published; and b) discuss what would reasonably be expected to occur in the foreseeable future if the project were not approved, based upon current plans and consistent with available infrastructure and community services. CEQA Guidelines § 15126.6(e)(1) & (2).

The CEQA Guidelines reject the reasoning of *Dusek v. Redevelopment Agency of the City of Anaheim* (1985) 173 Cal.App.3 1029 ("*Dusek*"), which stood for the proposition that the analysis of the "no project alternative" in an EIR "must describe maintenance of the existing environment as a basis for comparison of the suggested alternatives to the status quo." *Dusek, supra* at 1043. In effect, the *Dusek* court equated the "no project alternative" with the existing environmental setting, even though future activities under existing plans or policies could result in the alteration of existing conditions. The CEQA Guidelines call for a different approach, recognizing that the denial of a proposed project does not necessarily equate with the preservation of existing environmental conditions. This is particularly true in a case such as this where, if Venoco was denied the opportunity to reconfigure its leasehold production facilities, Venoco would be entitled to resume production operations with the same or similar equipment as existed at the time production operations were interrupted.[2] Thus, in our view the "no project alternative" properly consists of a description of the reasonably foreseeable resumption of operations as historically configured.

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[2] The notable exception would be the addition of new air pollution control equipment to capture gas that had historically been vented to the atmosphere from the pier.

III.

CONCLUSION

For the foregoing reasons, we conclude that Venoco has contractual and constitutional vested rights to resume PRC 421 operations, at least with repaired and replacement facilities as configured prior to the interruption of operations. Venoco needs no new discretionary special use permit to resume operations, and the City of Goleta is precluded from applying its land use and building permit regulations in a way that would frustrate the resumption of the operations. Discussion of the "no project alternative" in the EIR should include a description of operations in the previously configured mode, together with the associated environmental effects.

We hope that you have found this discussion helpful. Should you have any questions, please contact me.

Very truly yours,

HOLLISTER & BRACE

By 
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